

(11)
No. 84-1667

Supreme Court, U.S.
FILED

JAN 13 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BETHEL SCHOOL DISTRICT NO. 403, *et al.*,
Petitioners

v.

MATTHEW FRASER, *et al.*,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE *AMICI CURIAE*
AMERICAN BOOKSELLERS ASSOCIATION
MICHAEL SHECK FOUNDATION
IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

1. Is non-obscene, non-disruptive public school student speech protected by the First Amendment?
2. Is the Bethel School District's disruptive conduct rule unconstitutional on its face?



TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI	1
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
Part I	4
Part II	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	9
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982)	7
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	4
<i>Cohen v. California</i> , 405 U.S. 15 (1971)	7, 9
<i>Cornelius v. NAACP Education and Legal Defense Fund, Inc.</i> , — U.S. — (1985), 105 S.Ct. 3439 (1985)	8
<i>East Hartford Education Association v. Board of Education</i> , 562 F.2d 838 (2d Cir. 1977)	5
<i>F.C.C. v. Pacifica Foundation</i> , 483 U.S. 726 (1978)	7
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975)	4, 8
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1976)	8
<i>Keyshian v. Board of Regents</i> , 385 U.S. 589 (1967)	4
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	4
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415 (1963)	9
<i>New Jersey v. T.L.O.</i> , 469 U.S. —, 105 S.Ct. 733 (1985)	8
<i>Pappish v. University of Missouri Curators</i> , 411 U.S. 667 (1973)	8
<i>Powers v. Mancos School District & RE 6</i> , 539 F.2d 38 (10th Cir. 1976)	6
<i>Pratt v. Independent School</i> , 670 F.2d 771 (8th Cir. 1982)	5
<i>Seyfried v. Walton</i> , 668 F.2d 214 (3rd Cir. 1981) ..	5
<i>Sheck v. Baileyville School Committee</i> , 530 F.Supp. 679 (DC Me. 1982)	7
<i>Thomas v. Granville Board of Education</i> , 607 F.2d 1043 (2d Cir. 1979)	7, 9
<i>Tinker v. Des Moines Independent School District</i> , 393 U.S. 503 (1969)	4
<i>United States Commissioner of Customs v. One Book Called Ulysses</i> , — F.Supp. —	10
<i>West Virginia State Board of Education v. Bar- nette</i> , 319 U.S. 624 (1943)	8
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	4

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
Joyce, James, <i>Ulysses</i>	10
Pyles, Thomas, <i>The Origins and Development of the English Language</i> (Harcourt, Brace, Javon- vich: New York, 1971)	11



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IN SUPPORT OF THE RESPONDENTS**

INTEREST OF THE AMICI *

1. The American Booksellers Association is a national organization comprising 4,500 members which include 6,000 individual bookstores. The ABA was organized in 1909. Presently, their members account for eighty percent of all booksales of general interest by bookstores. For many years the ABA has closely watched First Amendment cases and feels the instant case is of great import.

2. The Michael R. Sheck Foundation is an organization committed to the freedoms of expression and re-

* Letters of Consent have been filed from both parties.

ligion. The Foundation grants monies to assist in this effort and feels the First Amendment may be severely impinged.

STATEMENT

Amici accept the Statement of the Case made by Respondents in their brief opposing certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents questions which sharply implicate the First Amendment rights of public high school students. The case is further confounded in that courts have granted wide latitude to school administrators in determining educational standards. Essentially, the Court is faced with defining the scope of the First Amendment; an amendment on which many of our individual freedoms are based.

The instant case comes to the Court on a Writ of Certiorari to the Ninth Circuit Court of Appeals. Respondent in this case brought an action against Petitioners in U.S. District Court alleging violations of 42 U.S.C. § 1983, the First Amendment, and the Fourteenth Amendment. The District Court held for Respondent awarding \$278 in damages and \$12,500 in attorney's fees and costs. The Ninth Circuit Court of Appeals affirmed the decision below.

In short, the case involves Matthew Fraser's speech before a student political assembly. In his speech, before a voluntary student assembly, Respondent spoke endorsing a candidate for office in the Associated Student Body. The record below clearly indicates that Respondent used sexual innuendo as a rhetorical device.¹ There is no evidence that the speech was obscene or "pervasively vulgar." As a matter of fact, Petitioners have made

¹ To believe that no student could have at least considered the possibility of such vigorous rhetoric is to wholly misunderstand the adolescent mind.

an admission that the speech was *not* obscene. The record further indicates that during Respondent's speech two students simulated sexual activity, one student simulated masturbation, and several students made boisterous noises. There is also an indication that the day following Respondent's speech one Home Economics class teacher allowed ten minutes of class time for discussion of the issue.

From the record in this case, which no part of is disputed by Petitioners it becomes immediately clear that the subsequent action of Petitioners is violative of Respondent's constitutional guarantees. (The Petitioner school board suspended Respondent for three days and removed his name from consideration as a graduation speaker.) There is not one scintilla of evidence on the record to indicate that the educational process was "materially" or "substantially" disrupted.

In Part I, *infra*, we will demonstrate that the Respondent's speech is protected on First Amendment grounds. While we understand that school authorities must be given wide latitude in maintaining school order, we do not believe they have the right nor the need to regulate non-obscene, non-disruptive student speech.

In Part II, *infra*, we will show that the Bethel School District Disruptive Conduct Rule is unconstitutionally vague. Further, in Part II, we will discuss the inherent dangers involved in a decision in favor of Petitioners.

Amici pray that this Court carefully consider the basic First Amendment rights implicated in the instant case and the concomitant havoc to be evoked if we deny them to our school children. If we make a mockery of the essential liberties, we should neither expect nor deserve our children's respect.

ARGUMENT

I. STUDENT SPEECH IS PROTECTED ABSENT A SHOWING OF OBSCENITY OR "MATERIAL" AND "SUBSTANTIAL" DISRUPTION OF THE EDUCATIONAL ENVIRONMENT.

"The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). "[E]ducation is perhaps one of the most important functions of state and local government. . . ." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "[E]ducation prepares individuals to be self-reliant, self-sufficient participants in society." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). ". . . [C]ourts are not school boards of legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Wisconsin v. Yoder*, *supra*, at 234-235. "The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

While recognizing the special nature of the school environment, this Court has made clear that students do not "shed their constitutional rights to free speech or expression at the school-house gates." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). Nor will this Court "tolerate laws which cast a pall of orthodoxy over" the school. *Keyshian v. Board of Regents*, 385 U.S. 589, 603 (1967). The "classroom is peculiarly the 'marketplace of ideas'." *Keyshian*, *supra*, at 603. If the necessarily restrictive environment of the classroom is a "marketplace of ideas" then is not a student assembly designed for rigorous student political inquiry even a larger "marketplace"?

Petitioners seem to be of the specious notion that school boards are exempt from the operation of the First

Amendment. See, *Seyfried v. Walton*, 512 F.Supp. 235, 238 (DC Md. 1981), *aff'd*, 668 F.2d 214 (3rd Cir. 1981), and *Pratt v. Independent School*, 670 F.2d 771 (8th Cir. 1982). Petitioners also assert that school boards may practice "indoctrination" of students virtually without restraint. This, simply is dangerous.

The evil to be avoided is the ideological indoctrination which would result from attempting to attain the laudable goal of instilling our youth with a set of moral values by barring their exposure to ideas inconsistent with those values.

Seyfried v. Walton, *supra*, at 220.

In *East Hartford Education Association v. Board of Education*, 562 F.2d 838, 846 (2d Cir. 1977), in which a teacher challenged the constitutionality of a dress code, the Second Circuit held:

Certainly a school board may make regulations that help promote the effective and efficient education of children. It may not, however, make regulations that infringe on constitutional interests while not realistically and significantly furthering the board's proper purposes.

The regulation at issue here implicates both a Fourteenth Amendment liberty interest and a First Amendment interest. The intersection of these two interests calls for a higher degree of scrutiny of the government's countervailing interest than would be the presence of either individual interest alone. See, *Police Department of Chicago v. Mosley*, 408 U.S. 92, 98-99, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (equal protection analysis-higher level of scrutiny required because both First and Fourteenth Amendment interests involved). See also *Gunther*, *supra*, 86 Harv. L.Rev. at 7 ("responsible 'balancing'" requires careful identification and separate evaluation of "each analytically distinct ingredient of the contending interests"). Thus we cannot "accept unquestioningly the school authorities' judgment as to the effects of

classroom conduct or speech," *James v. Board of Education*, 461 F.2d 566, 575 n.22 (2d Cir.) cert. denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 491 (1972), but rather must require a regulation of the sort at issue here to be "drawn as narrowly as possible to achieve the social interests that justify it" and to be "reasonably related to the needs of the educational process," *id.* at 574. At this stage of the proceedings, the Board has plainly failed to carry this burden, and its asserted interest are far outweighed by the individual interests at stake.

Surely, the First and Fourteenth Amendment considerations in any attempt to regulate speech calls for the most stringent scrutiny by the Court. School boards, should, and must, implement the day-to-day policies of education, but should not have free reign to censor student speech. Transient personal, religious or moral values of individual school board members should not wreak ideological havoc on the ultimate recipients of education, the students. A proper education presupposes freedom of choice, not ideological mind control; intellectual freedom versus ignorance.

Defendants would have this Court accept the notion that a school board's *objective* standards should always prevail in determining community values to be implanted upon its *secor.dary* school students. We, however, submit that *subjective* standards are more appropriate. See, *Powers v. Mancos School District & RE 6*, 539 F.2d 38 (10th Cir. 1976).

This Court has held that while school boards do not have absolute discretion to ban library books based upon *idea content*, a judicial inquiry as to the school board's *motivation* behind a book ban is proper. We assert that is the case with student speech as well. Justice Brennan suggests that no unconstitutional motivation would be present if a book were removed upon a showing that the book was "pervasively vulgar." Without citing prior

U.S. Supreme Court decisions dealing with obscenity standards, the majority opinion suggests that the "pervasively vulgar" standard is now applicable to book review for secondary school libraries. No definition of vulgarity is given. *Board of Education v. Pico*, 457 U.S. 853 (1982).

Amici submit that, even under the most stringent application of what constitutes "pervasively vulgar", Respondent's speech fails to come within that categorization.

School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children. . . . [B]ut school officials are not the final arbiters of their authority, nor do they have limitless discretion to apply their own notions of indecency. Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the rigorous from the vulgar."

Thomas v. Granville Board of Education, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring).

Petitioners rely upon the fact that they did not intend to suppress ideas in the instant case. But is it not words which convey ideas? How anomalous and dangerous then to *presume* their action was protected because they did not *intend* to suppress ideas. "Courts must remain on the First Amendment alert . . . even those ostensibly based on vocabular considerations. A less vigilant rule would leave the care of the flock to the fox that is only after their feathers." *Sheck v. Baileyville School Committee*, 530 F.Supp. 679, 688 (DC Me 1982).

Petitioner's reliance on the doctrine established in *F.C.C. v. Pacifica Foundation*, 483 U.S. 726 (1978) is clearly inapposite. This Court has clearly made a distinction between the sanctuary of the home and the forum which exists in a public place. *Cohen v. California*, 405

U.S. 15 (1971). Courts must remain particularly diligent in scrutinizing governmental intervention into expression which is based upon content, as opposed to its time, place, or manner. *See, Pappish v. University of Missouri Curators*, 411 U.S. 667 (1973). Petitioners have no basis for censoring non-obscene speech when the speech's content was consistent with the nature of the forum the school board established. *Cornelius v. N.A.A.C.P. Education and Legal Defense Fund, Inc.*, — U.S. —, 105 S.Ct. 3439 (1985).

Thus, it is clear that on First Amendment grounds Respondent's speech is protected.

II. PETITIONER SCHOOL BOARD'S DISRUPTIVE CONDUCT RULE IS UNCONSTITUTIONALLY VAGUE.

The Ninth Circuit affirmed the District Court's ruling that the Bethel School District's Disruptive Conduct Rule was "unconstitutionally vague, uncertain, and indefinite." The District Court also ruled it to be "substantially overbroad" as it was "so drawn as to sweep within its ambit protected speech or expressions of other persons not before this Court." PA at BS. It is true that the unique demands of the educational process allow greater flexibility in student disciplinary matters. *Goss v. Lopez*, *supra*; *New Jersey v. T.L.O.*, 469 U.S. —, 105 S.Ct. 733 (1985); *Ingraham v. Wright*, 430 U.S. 651 (1976), however, Petitioners seriously misapprehended the nature of *New Jersey v. T.L.O.*, *supra*, when relying upon it for the Court made clear that it was not applicable to student expression cases.

"[S]chool boards have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Petitioners state in their brief, at 33, that "the disruptive conduct rule as applied to Fraser was not unconstitutionally vague." While that may be a point for philosophical discussion, and inapplicable for Fraser's speech was protected, it is not incumbent upon the Court to even consider it for:

the Court consistently has permitted attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

Bigelow v. Virginia, 421 U.S. 809, 815-16 (1975).

For in appraising a statute's inhibitory effect upon [First Amendment] rights this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

NAACP v. Button, 371 U.S. 415, 432 (1963).

In schools, as in other "special settings," the state must make clear the classes and methods of expression which it deems irreconcilable with the specific institutional setting. *Cohen v. California*, 403 U.S. 15, 19 (1971); *Thomas v. Granville Board of Education*, *supra*, 607 F.2d at 1049 and n.10. "Because First Amendment freedoms need breathing space to survive, government may regulate in the arena only with narrow specificity." *NAACP v. Burton*, *supra*, at 433. It is undeniably clear that the Bethel School District's disruptive conduct rule fails to give any clear indication of the proscribed behavior or the ramifications of such behavior.

While the record indicates that Fraser's speech was his own original creation, let us, *arguendo*, assume he read the following:

I'm sure that by the clock like some kind of infant
I had at me they want everything in their mouth all

pleasure those men get out of women I can feel his mouth O Lord I must stretch myself I wished he were here or somebody to let myself go with or come again like I feel all fire inside of me or if I could dream when he made me spend ten second time tickling me behind with his finger with my legs around him I had to hug after O Lord I wanted to shout all sorts of things Fuck or shit or anything at all.²

This clearly contains vulgarity and sexual innuendo. Had he removed the four letter oaths and retained the innuendo could he then have been punished?³ If so the school board would have attacked *Ulysses*, a protected book since 1933. *U.S. Commissioner of Customs v. One Book Called Ulysses*, — F.Supp. — (1933).

What if someone made a remark, quite innocently, that was perceived to connote sexual activity, could they be punished? Words are not stagnate; there is inevitable semantic change.

It is a great pity that language cannot be that exact, finally tuned instrument that deep thinkers wish it would be. But the facts are, that the meaning of every word is susceptible to change of one sort or another, and some words have so many individual meanings that we cannot really hope to be absolutely certain of the sum of these meanings But it is probably quite safe to say that members of the human race . . . will go on making absurd noises with their mouths at one another in what idealists will always consider to be a deplorably inadequate and sloppy manner, and yet manage to understand one another well enough for their own purposes.

² Joyce, James, *Ulysses*.

³ If the Court is to hold non-obscene sexual innuendo to be unprotected, it is possible that library shelves would be devoid of such seminal works as *Phaedrus*, *Canterbury Tales*, *Romeo and Juliet*, and *On Interpretation of Dreams*. This Court must clearly be cautious in allowing attacks on intellectual freedom.

. . . And most of the manifold phenomena of life—hatred, disease, famine, birth, death, sex, war, atoms, isms, just to name a few—would remain as messy and hence as unsatisfactory to those unwilling to accept them as they always have been, no matter what words we use to refer to them. *See, Pyles, Thomas, The Origins and Development of the English Language*, (Harcourt, Brace, Javonovich: New York, 1971.)

The school board cannot use their indefinite rule to censor free speech. By their prudish standards modern fiction would fall to the wayside.⁴ Their rule is clearly inadequate for it fails to specify what is proscribed. For school administrators to declare by edict what may not be preferable language to be indecent simply is impractical and cannot pass constitutional muster.

CONCLUSION

For the aforementioned reasons the Court should affirm the judgment of the Courts below without modification.

Respectfully submitted,

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⁴ Cf. n.3, *infra*.